



December 21, 2018

Sent Via Email [Susan.Fregien@waterboards.ca.gov]

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Central Valley Regional Water Quality Control Board
City of Rancho Cordova
11020 Sun Center Drive, Suite 200
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Re: Proposed Changes to the Waste Discharge Requirements General Orders for Growers within the Central Valley That are Members of a Third-Party Group:

Tulare Lake Basin Area R5-2013-0120-05
Western Tulare Lake Basin Area R5-2014-0001-06
Western San Joaquin River Watershed R5-2014-0002-08
San Joaquin County and Delta Area R5-2014-0029-04
Sacramento River Watershed Area R5-2014-0030-06
Grassland Drainage Area R5-2015-0095-03
Sacramento Valley Rice Growers R5-2014-0032-02

Dear Ms. Fregien:

We appreciate the opportunity to comment on the proposed changes to the above-referenced waste discharge requirements general orders (the "Draft Orders"). While we support many of the changes, we are concerned that the Draft Orders still do not adequately protect sources of drinking water and the health and safety of those who rely on sources of drinking water.

A. On-Farm Well Testing

i. Deadlines

While we are sympathetic to the need to phase in well testing requirements based on staff capacity, we do not agree with extending implementation of this requirement to 2022. We think that gradually instituting the coalition requirement on a quarterly or at longest, semi-annual basis will give staff time to field questions, make improvements based on iterative experience, and physically prepare for the next round of notifications. This would allow the requirement to be fully implemented by 2020, thereby providing critical information to domestic well users subject to the order in a timely fashion.

ii. Noticing

If an on-farm domestic well tests positive for nitrates in excess of drinking water standards, growers should be required to notify neighboring private well or state small communities that

they too may be impacted by an exceedance of nitrates. This has been a consistent finding of the State Board's Office of Enforcement; instituting the requirement in this order will expedite the protection of those residents. State small water systems and private well communities are not required by law to test for dangerous contaminants and, due to their lack of sufficient economies of scale, regular testing can be unaffordable. Notifying such communities that it is likely they too may have a water quality exceedance will allow residents to make a more informed decision regarding well testing. Further, studies have shown that the most effective means of encouraging private well homeowners to test their wells is to let them know their neighbors did test and have a health exceedance.¹ This is consistent with our own experience conducting outreach regarding well testing programs.

Further on the issue of noticing, we are still disappointed that the Regional Board appears to deny the existence of other harms caused by the consumption of nitrate contaminated drinking water. Although we have submitted comments on the drinking water notification template, we wish to reiterate the importance of acknowledging and noticing to the public the harm that people other than pregnant women or infants are also at risk to public health risks from consuming high-nitrate water. While the acute impacts are most dire for pregnant women and infants, numerous studies also point to health risks associated with long-term exposure to nitrates such as certain types of cancer, thyroid complications, reduced cognitive functioning, and fatigue.² Yet despite these serious risks, the drinking water notification template makes no mention of the hazards associated with nitrates for the majority of the population, implying it is safe to drink so long as you are not pregnant or an infant.

iii. Testing for other contaminants

The East San Joaquin Order grants the Regional Board authority to mandate the testing of other contaminants. On-farm domestic wells are providing drinking water to farm workers and the families of the farmers. Testing for only nitrates does not even come close to ensuring that the water served to everyone using the wells is safe. Nor is nitrate the only contaminant that is associated with agriculture that poses a risk to human health. While no farmer today uses pesticides containing 1,2,3-TCP, irrigation is the cause of TCP being reintroduced into shallower groundwater levels. Furthermore, depending upon the depth of the drinking water well, naturally occurring contaminants such as arsenic or uranium may be present and introduced to groundwater through irrigation practices. As the providers of drinking water to dozens, if not hundreds, of individuals, growers must be responsible for testing their wells to ensure the safety of the water. We strongly recommend the Board revisit the testing requirements and require growers to test for more than just nitrates.

iv. Provision of replacement water

¹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4245378/>

² <http://groundwaternitrate.ucdavis.edu/files/138956.pdf>

The State Board's order included an expectation that the Regional Board would require the provision of replacement water, specifically stating that "The State Water Board expects that the Central Valley Water Board will, where appropriate, act promptly to require the Member to provide users with safe drinking water for consumption." That expectation is best met by including language in the revised order requiring testing of wells in the vicinity of wells that exceed the drinking water standard for nitrates, as well as the provision of replacement water.

In mandating the provision of replacement water, the Regional Board must ensure that the replacement supply also meets water quality standards. Requiring the provision of point-of-use/point-of-entry (POU/POE) devices may be insufficient, particularly where nitrate levels are more than double the drinking water standard, where other contaminants are present and where salinity levels are high.³ Follow-up testing will be needed to ensure that the interim solution chosen is appropriate to the water quality of the source.

We are also concerned that installation of a POU or POE device for nitrates would create the presumption that the water is now safe to drink, without taking into account the possibility of the presence of other dangerous contaminants. If POU/POE devices were permitted to be used, they would have to come with a disclaimer that the installation of the device does not guarantee the safety of the water with regards to other potential contaminants and that it only removes nitrates from the water. Further, these devices must be properly maintained to ensure that they continue to deliver safe drinking water. Simply providing the devices does not constitute compliance with a replacement water order.

B. The Regional Board Must Ensure That The Draft Orders Do Not Compound The Delays In Implementation That Have Already Occurred To Date.

The Central Valley's Irrigated Lands Program depends upon three independent efforts to ensure that water quality objectives are met, each of which has been subject to significant delays:

1. Trend Monitoring Program. This program is meant to identify whether water quality conditions are changing, for better or worse. The workplan for this program, originally due in 2015, was conditionally approved in late 2017, with sampling required to begin in

³ Nitrate concentrations in source water may be too high to be eligible for POU or POE treatment. The upper limit of certified devices is 108 mg/L (measured as nitrate). Furthermore, it is common to have nitrate concentration levels fluctuate throughout the year. For example, if a well tests close to the upper treatment limit at the end of summer, it is likely to exceed 108 mg/L at the end of the rainy season when the nitrates have been flushed out of the vadose zone and into the levels of the aquifer that drinking water supply wells reach. If this happens, the filter is likely to fail earlier than expected, resulting in the provision of unsafe water to the well users. Thus in situations where the nitrate concentration in the source water is nearing the MCL, the installation of a POU or POE device would not be appropriate unless testing is done more frequently than once a year. Second, the presence of additional contaminants, including secondary contaminants like TDS, can impair the efficacy of a POU or POE device. Considering that the Regional Water Board is not currently requiring the testing of additional contaminants, this poses a serious risk to the well users.

the fall of 2018. There is no indication that the workplan has been amended to address the Board's conditional approval.

2. Groundwater Quality Management Plans. While the plans were submitted in 2014-2016, the regional board found all of them wanting, and finally provisionally approved all of the plans in 2016. There has been no public action to either improve the plans or revoke the provisional approvals, despite their acknowledged shortcomings.
3. Management Practice Evaluation Program. As specified in the original order, this was a 6-year program to identify practices protective of water quality for crops grown on 80% of the irrigated lands in each coalition. The workplans were originally due in 2015, with a final report date of 2021. The actual approval date was 2017 for the Northern San Joaquin/Sacramento region, and have yet to be completed in the South San Joaquin.

Our concern is that the Draft Orders will be taken as a justification for further delay, thus setting back efforts to reduce degradation, attain compliance with water quality objectives, and ultimately improve water quality. The Regional Board must ensure timely implementation of the trend monitoring program, GQMPs and the MPEP, as well as the other programs contained in the original Orders and the revised Draft Orders.

C. The Draft Orders Violate The Porter-Cologne Water Quality Control Act.

Water Code § 13263(a) requires that the Regional Board prescribe waste discharge requirements, which “shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.” The requirements “may contain a time schedule, subject to revision in the discretion of the board.” (Water Code § 13263(c).)

i. The Draft Orders Fail To Implement The Relevant Water Quality Control Plans.

The Central Valley Region is subject to two water quality control plans: the Water Quality Control Plan for the Tulare Lake Basin and the Water quality Control Plan for the Sacramento and San Joaquin River Basins (collectively the “basin plans”).⁴

Both basin plans require, with respect to the numeric water quality objective for nitrate in groundwater, that “[a]t a minimum, ground waters designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels (MCLs) specified in the following provisions of Title 22 of the California Code of Regulations, which are incorporated by reference into this plan ... Tables 64431-A (Inorganic Chemicals) ...” (Sacramento III-10.00; TLB III-8.00.) Table 64431-A sets the MCL for nitrate at 10 milligrams per Liter (measured as nitrogen). The basin plans state that

⁴ Though the Regional Board adopted amendments to both water quality control plans in May of 2018, the amendments have not been approved by the SWRCB as of the date of this letter. As such, all citations are to the July 2016 versions of the plans.

the Regional Board can “apply limits more stringent than MCLs” to protect beneficial uses, but not set less stringent limits. (Sacramento III-10.00; TLB III-7.00.)

They further state that, “[w]here the Regional Water Board determines it is infeasible for a discharger to comply immediately with such [water quality] objectives or criteria, compliance shall be achieved in the shortest practicable period of time (determined by the Regional Water Board), not to exceed ten years after the adoption of applicable objectives or criteria.” (See Sacramento III-2.00; TLB III-2.00.) “[Water quality] objectives are to be achieved primarily through adoption of waste discharge requirements(including permits) and cleanup and abatement orders.” (Sacramento III-1.00; TLB III-1.00 “[“Controllable factors are not allowed to cause further degradation of water quality in instances where uncontrollable factors have already resulted in water quality objectives being exceeded.”].)

Additionally, the basin plans incorporate the Nonpoint Source policy (Sacramento p. IV-10.01; TLB V-2.01), which states under Key Element 4 that “[a]n NPS control implementation program shall include sufficient feedback mechanisms so that the [Regional Boards], dischargers, and the public can determine whether the program is achieving its stated purpose(s).”

The Draft Orders do not require in any real sense, either immediate compliance with the numeric water quality objective for nitrate in groundwater, or compliance in the “shortest practicable period of time” not to exceed ten years “after the adoption of applicable objectives or criteria.” As eloquently noted in *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.*(2012) 210 Cal.App.4th 1255 (hereinafter “AGUA”), the “wish is not father to the action.” This is to say that a stated prohibition is insufficient without provisions to require compliance with the prohibition and timely implementation of those provisions. (See Section B, *supra* [detailing delays to date].)

The Draft Orders state that “[w]astes discharged from Member operations shall not cause or contribute to an exceedance of applicable water quality objectives in the underlying groundwater, unreasonably affect applicable beneficial uses, or cause or contribute to a condition of pollution or nuisance.” (See, e.g., TLB Order, p. 20; see also p. 18 [The “...Order authorizes degradation of high quality waters, not to exceed water quality objectives, threaten beneficial uses, or cause a condition of pollution or nuisance.”].) However, nothing in the WDR actually prevents the exceedance of the water quality objective for nitrate in groundwater, or provides the “feedback mechanisms” required by the Nonpoint Source policy.

This is for several reasons: (a) the Draft Orders do not require auditing or verification of reporting; (b) the Draft Orders do not require reporting monitoring sufficient to quickly identify when and where degradation is occurring; (c) the Draft Orders do not contain enforceable limits on nitrate loading; and (d) the Draft Orders do not require compliance with water quality objectives in the shortest practicable period of time.

ii. The Draft Orders Do Not Adequately Take Into Consideration The Beneficial Uses, The Water Quality Objectives Reasonably Required To Protect Beneficial Uses Or The Need To Prevent Nuisance.

As demonstrated above, though the Draft Orders purport to require dischargers to protect the MUN beneficial use in groundwater by complying with the nitrate MCL, they lack the reporting, monitoring and limits necessary to implement such a restriction. As such, they do not adequately take into consideration beneficial uses, the water quality objectives reasonably required to protect those uses, or the need to prevent nuisance.

iii. The Draft Orders Do Not Adequately Take Into Consideration The Provisions Of Water Code § 13241.

Water Code § 13241 states that, in setting water quality objectives, factors to be considered by the regional board “shall include but not necessarily be limited to, all of” the following:

- (a) Past, present, and probable future beneficial uses of water.
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- (d) Economic considerations.
- (e) The need for developing housing within the region.

...

These factors must also be considered when adopting WDRs. (*City of Burbank v. State Water Resources Control Bd.*, 35 Cal.4th 613, 627 [Regional board must consider § 13241 factors when issuing waste discharge requirements pursuant to § 13263, except where State restrictions are exceeded by Federal requirements inapplicable here].)

As noted above, the Draft Orders do not adequately take into consideration the beneficial uses of water. With respect to economic considerations, the State and Regional Boards have failed to give proper consideration and weight to economic considerations of beneficial users of groundwater, including but not limited to the cost of drinking water treatment, the purchase of replacement water, and the health impacts of reliance on drinking water contaminated with nitrate. (See Section C, *infra*.)

Further, regarding the need for developing housing within the region, the Draft Orders state only that they do not intend “to establish requirements for any facilities that accept wastewater from residences or stormwater runoff from residential areas. This Order will not affect the development of housing within the region.” (See, e.g., TLB Order, Attch. A, p. 56.) The conclusion does not follow from the premise. The WDRs may affect housing without regulating

wastewater from residences or stormwater runoff in residential areas. For example, the cost of treating contaminated groundwater may make the development of affordable housing in the region infeasible. Without taking into consideration these potential effects, the Draft Orders fail to comply with §§ 13263 and 13241.

D. The Draft Orders Violate The State Antidegradation Policy.

Prior to adoption of the Draft Orders, the Regional Board must complete a legally adequate Antidegradation Analysis — something it has yet to do.

The State Antidegradation Policy is set forth in Resolution 68-16, which states in part that high quality waters shall “be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.”

Resolution 68-16 further states that “[a]ny activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with the maximum benefit to the people of the State will be maintained.”

In *AGUA*, 210 Cal.App.4th at 1258-59, the court held that a general waste discharge order issued by the Central Valley Regional Water Control Board in 2007, which purported to prohibit further degradation of groundwater from existing dairy farms, was inconsistent with the antidegradation policy. The court noted that a conclusory prohibition on further degradation was not sufficient to comply with the antidegradation policy. (*Id.* at 1259.) Instead, the *AGUA* court held that the Regional Board, in order to comply with the Antidegradation Policy, must affirmatively “demonstrate” compliance with the Policy. (*Id.* at 1278.)

This affirmative requirement is accomplished through a “two-step process” for “determining whether a discharge into high quality waters is permitted.” (*Id.* at 1278, 1282.) The first step of the process is for the Regional Water Board to make three (3) “specified findings,” that the “change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies...” (*Id.* at 1278.)

The second step of the Antidegradation analysis required by *AGUA* is a finding “that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.” (*Id.*)

The Draft Orders do not comply with these requirements.

i. The Draft Orders Authorize New Degradation To High Quality Waters.

The Draft Orders state that they are effective as of the date of original adoption and remain “in effect unless rescinded or revised by the Central Valley Water Board.” (See, e.g., TLB Order p. 43.) However, though the Draft Orders do not specify the time period that they will remain in effect, Water Code § 13263(e) states that waste discharge requirements “shall be reviewed periodically.” The Regional Board’s mandatory duty to review waste discharge requirements “periodically” necessarily includes the duty to review general orders for compliance with state policies, including the Antidegradation Policy and the Nonpoint Source Policy. (See Water Code § 13240.) As such, waste discharge requirements cannot remain in effect in perpetuity without substantive review, and by reviewing and revising the orders here without newly assessing compliance with Porter-Cologne, the Antidegradation Policy and the Nonpoint Source Policy, the Regional Board is likely putting off the time for its next periodic review, and thus is authorizing new degradation over and above that authorized by the original orders.

Additionally, the Draft Orders extend the time periods for certain reporting requirements, which had already been delayed in implementation. Given the iterative process of adopting management practices, review and reporting of the effectiveness of those practices, and adoption of “improved” practices, any extension of time for review and reporting has the effect of increasing degradation. This is especially true given that consideration of the Draft Orders follow substantial delays in implementation to date, and are likely to serve as justification for additional delay if adopted. (See Section B, *supra*.)

Along the same lines, degradation that was not foreseeable on the date that the Draft Orders were initially adopted — whether due to lack of data or simply limitations on ability to predict developments into the future — is not supported by the findings required by the Antidegradation Policy. The Antidegradation Policy requires analysis of new data that may or may not significantly change the original analysis. As the Antidegradation analysis has not been revised since the Regional Board’s improved understanding of groundwater, nitrate contamination, and best practices available, the Regional Board cannot allow degradation of high quality waters in the Draft Orders.

ii. The Regional Board Has Not Considered New Data Collected Since The Orders Were Originally Adopted.

In Order 2018-0002, the SWRCB declined to alter the Antidegradation analysis set forth in General Order R5-2012-0116. However, the Board also stated that “[a]s the data and our understanding evolves, of course, so too must the regional water boards’ analyses of maximum benefit and best practicable treatment or control.” (Order 2018-0002, p. 80.) The WDRs at issue here were originally adopted in 2013, 2014 and 2015. Significant data has been generated and collected over that time period, and the Regional Board’s Antidegradation analysis must also be updated to incorporate that data and understanding.

iii. The Antidegradation Analysis Does Not Make The Proper Baseline Comparison.

“When undertaking an antidegradation analysis, the Regional Board must compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives.” (*AGUA*, 210 Cal.App.4th at 1270.) Then, “[i]f the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved” and “the antidegradation policy is not triggered.” (*Id.*) On the other hand, “if the baseline water quality is better than the water quality objectives, the baseline water quality must be maintained in the absence of findings required by the antidegradation policy.” (*Id.*)

The Regional Board has not conducted this baseline analysis for any of the Draft Orders, though it acknowledges that some high quality waters will be degraded. (See, e.g., TLB Order, Attch. A, p. 50 [“This Order allows degradation of existing high quality waters.”].) This does not comply with the requirements of the Antidegradation policy as discussed in *AGUA*. While reliable data regarding groundwater conditions since 1968 is not always available, the State and Regional Boards were required to analyze available data and make a reasonable effort to analyze water quality since 1968.

iv. The “Maximum Benefit” Finding Is Not Supported.

The finding that a change in water quality will be “consistent with the maximum benefit to the people of the State” must be made on a “case-by-case basis...based on considerations of reasonableness under the circumstances at the site.” (*Id.* at 1279.) In making this “case-by-case” finding, the Board must consider the following factors “(1) past, present, and probable beneficial uses of the water (specified in Water Quality Control Plans); (2) economic and social costs, tangible and intangible, of the proposed discharge compared to the benefits, (3) environmental aspects of the proposed discharge; and (4) the implementation of feasible alternative treatment or control methods.” (*Id.*)

The Draft Orders state a total of eight (8) findings in support of its “maximum benefit” analysis:

- At a minimum, this Order requires that irrigated agriculture achieve and maintain compliance with water quality objectives and beneficial uses;
- The requirements implementing the Order will result in use of BPTC where irrigated agricultural waste discharges may cause degradation of high quality waters; where waters are already degraded, the requirements will result in the pollution controls that reflect the “best efforts” approach. Because BPTC will be implemented, any lowering of water quality will be accompanied by implementation of the most appropriate treatment or control technology;

- Central Valley communities depend on irrigated agriculture for employment (PEIR, Appendix A);
- The state and nation depend on Central Valley agriculture for food (PEIR, Appendix A);
- As stated in the PEIR, one goal of this Order is to maintain the economic viability of agriculture in California's Central Valley;
- Consistent with the Order's and PEIR's stated goal of ensuring that irrigated agricultural discharges do not impair access to safe and reliable drinking water, the Order protects high quality waters relied on by local communities from degradation of their water supplies by current practices on irrigated lands. The Order is designed to prevent irrigated lands discharges from causing or contributing to exceedances of water quality objectives, which include maximum contaminant levels for drinking water. The Order imposes more stringent requirements in areas deemed "high vulnerability" based on threat to groundwater beneficial uses, including the domestic and municipal supply use. The Order also is designed to detect and address exceedances of water quality objectives, if they occur, in accordance with the compliance time schedules provided therein.
- Because the Order prohibits degradation above a water quality objective and establishes representative surface water monitoring and groundwater monitoring programs to determine whether irrigated agricultural waste discharges are in compliance with the Order's receiving water limitations, local communities should not incur any additional treatment costs associated with the degradation authorized by this Order. In situations where water bodies are already above water quality objectives, the requirements established by this Order will institute time schedules for reductions in irrigated agricultural sources to achieve the Order's receiving water limitations; and
- The Order requires Members to achieve water quality management practice performance standards and includes farm management practices monitoring to ensure practices are implemented to achieve these standards. The iterative process whereby Members implement practices to achieve farm management performance standards, coupled with representative surface and groundwater monitoring feedback to assess whether practices are effective, will prevent degradation of surface and groundwater quality above water quality objectives.

(See, e.g., TLB Order, Attch. A, pp. 50-51.)

Beginning with the requirement to consider the beneficial uses of water, the Draft Orders state that irrigated agriculture is required to achieve and maintain compliance with water quality objectives. (*Id.*) However, the Draft Orders do not, in any practical or enforceable sense, require irrigated agriculture to achieve and maintain water quality objectives. Thus, the finding is not supported by the evidence, and beneficial uses of water have not been adequately analyzed.

Turning to economic and social costs, the Draft Orders fail to apply the proper legal standards. In considering “economic” costs, the Regional Board must consider “both costs to the discharger and the affected public,” and in doing so, “[c]ost savings to the discharger, standing alone, absent a demonstration of how these savings are necessary to accommodate ‘important social and economic development’ are not adequate justification” for permitting degradation. (*AGUA*, 210 Cal.App.4th at 1279.) In considering “social” costs, consideration must be given to whether a lower water quality can be abated through reasonable means. In other words, the lower water quality should not result from inappropriate treatment facilities or less-than-optimal operation of treatment facilities.” (*Id.*)

The Draft Orders here rely on only two findings with respect to economic and social costs: (a) that Central Valley communities rely on agriculture for employment; and (b) that the state and nation depend on Central Valley agriculture for food. (See, e.g., TLB Order, Attch. A, p. 50.) There is no finding or comparison regarding the economic or social costs to the segment of the public that will be affected by nitrate discharges. Moreover, there is no “site-specific” analysis of the economic and social costs to the discharger of stricter protections against nitrate discharges to groundwater within the coalition (e.g., costs of better reporting or groundwater monitoring, how much employment would be lost as a result, the extent to which the State relies on agriculture within the watershed for food, etc.) compared to the economic and social costs in the watershed in terms of increased treatment costs and resulting health impacts.

The economic and social costs of “limited degradation” to the general public will be substantial, and thus should have been considered. “95% of the [San Joaquin] valley’s population relies on groundwater for drinking.” (Carolina Balazs et al., *Social Disparities in Nitrate-Contaminated Drinking Water in California’s San Joaquin Valley* (Environmental Health Perspective 2011).⁵) Further, as recognized in the Water Quality Control Plan, the Antidegradation Implementation Policy applies when the Regional Board issues a permit. (IV-15.01.) It also states that “Implementation of this policy to prevent or minimize surface and groundwater degradation is a high priority for the Board. In nearly all cases, preventing pollution before it happens is much more cost-effective than cleaning up pollution after it has occurred. ... cleanup of groundwater is costly and lengthy due, in part, to its relatively low assimilative capacity and inaccessibility. The prevention of degradation is, therefore, an important strategy to meet the policy’s objectives.” (IV-15.01-16.00.)

⁵ Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3230390/>

The Draft Orders contain no analysis of the environmental aspects of the proposed authorized degradation of existing high quality waters, and thus does not contain an adequate “maximum benefit” finding.

Finally, with respect to implementation of feasible alternative treatment or control methods, the Draft Orders state that BPTC and Best Efforts are required pursuant to a “process of becoming aware of effective management practices; evaluating their practices; and implementing improved practices.” (See, e.g., TLB Order, Attch. A, p. 36.) However, the Draft Orders do not require that management practices actually achieve practices which are “best practicable.” Rather, they require an “iterative planning approach” with two steps: “1) establishment of a baseline set of universal farm water quality management standards combined with upfront evaluation, planning and implementation of management practices to attain those goals, and 2) additional planning and implementation measures where degradation trends are observed that threaten to impair a beneficial use or where beneficial uses are impaired (i.e., water quality objectives are not being met).” (*Id.* at p. 39.)

As the Draft Orders fail to properly analyze whether the “limited degradation” permitted is consistent with the maximum benefit to the people of the state, the Antidegradation analysis is inadequate.

v. The Findings That The Change In Water Quality Will Not Unreasonably Affect Present And Anticipated Beneficial Uses Or Result In Water Quality Less Than That Prescribed In State Policies Are Not Supported.

The monitoring and reporting requirements in the Draft Orders are not sufficient to identify where discharges are occurring, and do not set any enforceable limits or targets for nitrogen loading. Therefore, they permit degradation that will unreasonably affect beneficial uses.

E. The Draft Orders Violate The Nonpoint Source Policy.

Key legal precedent interpreting the Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (the “NPS Policy”) has been published since the SWRCB’s adoption of Order 2018-0002. This precedent must be addressed in the Draft Orders by, among other things, including a specific time schedule and quantifiable milestones to achieving water quality objectives.

The SWRCB adopted the NPS Policy in 2004. According the the NPS Policy, before adopting an NPS implementation program, the regional board must find that “there is a high likelihood the implementation program will attain the RWQCB’s stated water quality objectives.” The NPS Policy additionally requires that NPS control programs include five (5) key elements:

KEY ELEMENT 1: An NPS control implementation program’s ultimate purpose shall be explicitly stated. Implementation programs must, at a minimum, address NPS pollution in a manner

that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

KEY ELEMENT 2: An NPS control implementation program shall include a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program's stated purpose(s), the process to be used to select or develop MPs, and the process to be used to ensure and verify proper MP implementation.

KEY ELEMENT 3: Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation program shall include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.

KEY ELEMENT 4: An NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.

KEY ELEMENT 5: Each RWQCB shall make clear, in advance, the potential consequences for failure to achieve an NPS control implementation program's stated purposes.

On September 18, 2018, the court in *Monterey Coastkeeper v. State Water Resources Control Bd.* (2018) 28 Cal.App.5th 342 interpreted the NPS Policy in the context of a conditional waiver, modified on review by the SWRCB, regulating irrigated agriculture in the Central Coast Region. The *Monterey Coastkeeper* court held that the conditional waiver violated the NPS Policy because it did not satisfy all of the Key Elements listed above.

Specifically, with respect to Key Element 3, the court held that the conditional waiver defined "compliance to mean the implementation of increasingly improved management practices and it does so without any definition or quantification of improvement." (*Id.* at 368.) The court noted the SWRCB's explanation on review that "it would not take any enforcement action against a discharger who was implementing and improving management practices to address water quality problems. Dischargers need only make 'a conscientious effort to identify and implement the management practices that effectively address the water quality issue.'" (*Id.*)

In holding that the conditional waiver did not comply with Key Element 3, the court reasoned that "the NPS Policy *expressly* requires time schedules and quantifiable milestones; the purpose is to assure that the water quality objectives are eventually met." (*Id.* at 369 [emphasis in the

original].) It further reasoned that, contrary to this requirement, the conditional waiver required only “vague and indefinite improvement — “a conscientious effort.” (*Id.*) The court concluded that “[w]ithout specific time schedules and quantifiable milestones, there is not a ‘high likelihood’ the program will succeed in achieving its objectives, as required by NPS Policy.” (*Id.* at 370.)

The Draft Orders here suffer from the same flaws as the modified conditional waiver in *Monterey Coastkeeper* — there are no specific time schedules or quantifiable milestones to meeting water quality objectives. Rather, the Draft Orders set forth an “iterative process” to achieving water quality objectives whereby dischargers institute management practices, evaluate the effectiveness of those practices, and where practices do not achieve water quality objectives, implement “improved practices.” (See, e.g., TLB Order, Attch. A, pp. 32-33, 36.) Just as in *Monterey Coastkeeper*, the Draft Orders do not set forth specific time schedules for achieving water quality objectives, and do not define “improvement.”

As the Draft Orders do not contain specific time schedules or quantifiable milestones to achieving water quality objectives, there is not a “high likelihood” that the program will succeed in achieving the objectives of the NPS Policy.

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Based on the issues discussed above, we do not believe that the Draft Orders adequately implement the Irrigated Lands Regulatory Program or applicable law. We look forward to working with the Regional Board and staff to address these issues.

Respectfully submitted,



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